

**BRIEFING NOTE: THE AUSTRALIAN FEDERAL COURT JUDGMENT IN THE
JAPANESE WHALING CASE
HUMAN SOCIETY INTERNATIONAL INC V KYODO SENPAKU KAISHA LTD [2008] FCA**

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EXECUTIVE SUMMARY:

On 15 January 2008 the Australian Federal Court delivered its judgment in the case *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3¹ on the legality under Australian Domestic Law of Japanese whaling in the Whale Sanctuary declared by Australia in the waters adjacent to Australia's Antarctic Territory. Japan claims these waters are high seas and does not recognize Australia's territorial claim in Antarctica. This briefing note has been prepared as a summary of the decision in that case to aid informed debate of the whaling issue at the Pew sponsored Whale Symposium to be held at the United Nations University, Tokyo on 30 and 31 January 2008.

In summary the judgment of the Australian Federal Court in the Whaling Case did not rule on the legality or otherwise of Japanese whaling under international law but was confined to issues of Australian domestic Law. The Court did not rule on whether the whaling was 'scientific research' for the purposes of the International Whaling Convention. However, the Court did rule that Japanese Whaling within the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory contravened the provisions of the Australian *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*). In particular the Court held that the Respondent had contravened ss 229, 229A, 229B, 229C, 229D and 230 of the *EPBC Act* in relation to Antarctic minke whales and fin whales by killing, injuring, taking and interfering with them and the treating and possessing of them and by injuring, interfering with and treating and possessing humpback whales and that, unless restrained, it will continue to kill, injure, take and interfere with them, and treat and possess them. The Court issued an injunction to restrain the Japanese whalers from continuing with such conduct.

BACKGROUND: On 15 January 2008 the Australian Federal Court delivered its judgment on the legality under Australian Domestic Law of Japanese whaling in the Australian declared Whale Sanctuary in waters adjacent to Australia's Antarctic Territory. This briefing note has been prepared as a concise summary of the decision in that case to aid informed debate of the whaling issue at the Pew Sponsored Whale Symposium to be held at the United Nations University, Tokyo on 30 and 31 January 2008. The briefing note does not examine the merits or otherwise of the decision but aims to clarify the main legal issues presented in the case.

It should be stressed that the judgment of the court essentially dealt with issues under Australian domestic Law. Although a number of relevant issues under International Law were canvassed in the

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¹ The full text of the courts judgment has been published and is available on the internet at <http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html>

judgment the decision is essentially a determination of the legality (in fact the illegality) of Japanese Whaling under Australian domestic Law (although of course it does have international implications). The significance of this distinction should not be lost in future debate on the judgment and the whaling issue more generally.

OVERVIEW OF AUSTRALIAN DOMESTIC LAW IN RELATION TO WHALING:

The Australian *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*) established the Australian Whale Sanctuary. Under section 225 of the *EPBC Act* the Australian Whale Sanctuary comprises

- the waters of the EEZ (other than the coastal waters of an Australian State² or the Northern Territory of Australia);
- coastal waters of an Australian State or the Northern Territory which are prescribed waters under the *EPBC Act*; and
- any marine or tidal waters that are inside the baseline of the territorial sea adjacent to an external Territory, whether or not within the limits of an external Territory.

In the Australian Whale Sanctuary the *EPBC Act* regulates actions that will have, or are likely to have, a significant impact on threatened or migratory cetacean species that are listed under the Act.³ Five whale species found in Australian waters are listed as threatened species under the Act.⁴ The *EPBC Act* also provides for the identification of key threatening processes for native cetacean species and the preparation of threat abatement plans, wildlife conservation plans, conservation agreements and recovery plans in relation to cetaceans and other species.⁵

The *EPBC Act* creates a number of criminal offences with respect to activities involving cetaceans in the Australian Whale Sanctuary. These include:

- intentionally taking an action that results in the death of a cetacean (section 229);
- a separate strict liability offence of taking an action that results in the death of a cetacean (section 229A(1));
- intentionally taking, trading, keeping, moving or interfering with a cetacean (section 229B). (The term "interfere" with a cetacean is defined to include harass, chase, herd, tag, mark or brand the cetacean);
- a strict liability offence of taking, trading, keeping, moving or interfering with a cetacean (section 229B(1));
- treating an illegally killed cetacean (section 229D);
- possessing a cetacean, part of a cetacean or product derived from a cetacean where the cetacean has been killed in contravention of section 229 or 229A or taken in contravention of section 229B or 229C.

In addition sections 232A to 235 provide for various offences related to the import and export of cetaceans, parts of cetaceans or products derived from cetaceans, regardless of their place of origin.

² Australia is a Federation of 6 States.

³ Australian Department of the Environment and Water Resources web site <<http://www.environment.gov.au/coasts/species/cetaceans/protecting.html>> accessed 16 January, 2008.

⁴ Ibid.

⁵ Ibid.

Section 236 also imposes strict liability on the Master of a foreign whaling vessel if it is brought into an Australian port without permission from the Minister for the Environment.

At the time these Court proceedings were commenced penalties which applied for the various offences under *EPBC Act* included:

- imprisonment for not more than 2 years and/or a fine not exceeding AUD\$110,000 for an offences under sections 229 and 229B, 229D, 230,
- a fine not exceeding AUD\$55,000 for the strict liability offences under sections 229A, 229C, 236.
- a fine not exceeding AUD\$110,000 and or imprisonment for up to 10 years for the export and import offences under sections 232A and 232B; and
- a fine not exceeding AUD\$110,000 and or 5 years imprisonment for the possession offence under section 233 and for treating illegally imported cetacean etc under section 234.

However, under section 235 the *EPBC Act* provides that sections 232A, 232B, 233 and 234 do not apply to:

- an action authorised by a permit that was issued under section 238;
- an action provided for by, and taken in accordance with, a recovery plan, or a wildlife conservation plan, made or adopted under the *EPBC Act*;
- an action that is taken in a humane manner and is reasonably necessary to relieve or prevent suffering by a cetacean;
- an action that is reasonably necessary to prevent a risk to human health;
- an action by a Commonwealth or State or self-governing territory agency that is reasonably necessary for the purposes of law enforcement;
- an action that is reasonably necessary to deal with an emergency involving a serious threat to human life or property; or
- an action that occurs as a result of an unavoidable accident, other than an accident caused by negligent or reckless behaviour.

Section 246 of the *EPBC Act* also vests ownership of all cetaceans in the Australian Whale Sanctuary or dealt with in contravention of the Act in the Australian government.

The *EPBC Act* operates in Australia's Antarctic Territory in accordance with the provisions of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth). The latter Act implements Australia's obligations under, inter alia, the *Madrid Protocol to the Antarctic Treaty*.⁶

THE ISSUES THE COURT WAS ASKED TO RULE ON:

The case was commenced on 19 October 2004 by the Humane Society International Inc (the Applicant) which is a not for profit non governmental organization (NGO). Kyodo Senpaku Kaisha Ltd, the Respondent in this case (the Respondent) is a Japanese company which the Court found was the registered owner of the vessels the *Kyoshin Maru No 2*, *Yushin Maru*, *Yushin Maru No 2*, *Kyo Maru No 1*, *Kaikoh Maru*, *Toshi Maru No 25* and *Nisshin Maru*. These vessels have conducted

⁶ *Protocol on Environmental Protection to the Antarctic Treaty*, 30 ILM (1991).

whaling in waters off Antarctica pursuant to the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA), issued by Japan under Article VIII of the *International Convention for the Regulation of Whaling*⁷ (the Whaling Convention) and, from 2005 under a second, expanded whaling program known as JARPA II.

Section 475 of the *EPBC Act* permits an interested person to bring proceedings where another person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the *EPBC Act*. An interested person under section 475 includes, inter alia, organizations whose objects or purposes in the 2 years immediately before the conduct or proposed conduct occurred included the protection or conservation of, or research into, the environment. Thus this provision gives standing to environmental NGO's to seek court orders to enforce the Act. In an order made on 23 November 2004 His Honour Justice Allsop accepted that the Applicant falls within the definition of an "interested person" under section 475⁸, and this finding was implicit in the Courts final judgment, and in particular in references to the fact that the Applicant had standing to bring the case without permission from the Attorney General contained in the judgment.

After commencing the proceedings the Applicant sought leave to plead its case, in part, on the basis that the whaling conducted pursuant to the JARPA by the Respondent was not scientific whaling. However, the Applicant was not given leave to do this. So it is very important to note that the case did not challenge the legality or otherwise of the JARPA permits under the Whaling Convention. Instead the case centered solely on the legality or otherwise of the Respondents Whaling under Australian law and under the *EPBC Act* in particular.

The Respondent and the Japanese Government have not recognised the jurisdiction of the Australian Courts to hear this case and chose not to be represented by lawyers at the hearing.⁹ The case therefore proceeded to trial in the absence of the Respondent on 18 September 2007.

The case alleged by the Applicant as set out in its amended statement of claim was as follows:

- That the respondent has intentionally engaged in a series of activities that have resulted in Antarctic minke whales and fin whales being killed, taken and interfered with, and humpback whales being taken and interfered with, within the Australian Whale Sanctuary, and subsequently intentionally treated and possessed in contravention of s 229, 229A, 229B, 229C, 229D and 230 of the *EPBC Act*;
- That the conduct was done in accordance with the Japanese Whaling Research Program under Special Permit in the Antarctic (JARPA) issued by the government of Japan under Article VIII of the Whaling Convention;
- That JARPA is not a recognised foreign authority for the purposes of subsection 7(1) of the *Antarctic Treaty (Environment Treaty (Environment Protection Act) 1980 (Cth)*;

⁷ *International Convention for the Regulation of Whaling*, 161 UNTS 72.

⁸ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd*, interim judgment on Applicants Motion for Service Outside the Jurisdiction, 23 November 2004, per Allsop J.

⁹ In a note verbale dated 26 October 2006, the Japanese Ministry of Foreign Affairs refused to allow court documents to be served on the Respondent through diplomatic channels on the grounds that "this issue relates to waters and a matter over which Japan does not recognize Australia's jurisdiction".

- That the respondent is not permitted or authorised to kill, take, interfere with, treat or possess whales in accordance with ss 231, 232 or 238 of the *EPBC Act*;
- That, unless restrained, the respondent will in the future intentionally kill, take and interfere with whales within the Australian Whale Sanctuary, and subsequently intentionally treat and possess Antarctic minke whales, fin whales and humpback whales in contravention of the *EPBC Act*.

In presenting its case the Applicant relied upon reports submitted by the Respondent to the International Whaling Commission pursuant to JARPA and JARPA II as evidence of the Respondents whaling activity in the Antarctic.¹⁰

THE JUDGMENT OF 15 JANUARY 2008

On 15 January 2008 Justice Allsop of the Federal Court handed down the Courts judgment concluding that on the basis of the evidence submitted by the Applicant the Court was satisfied that

“the respondent has contravened ss 229, 229A, 229B, 229C, 229D and 230 of the EPBC Act in relation to Antarctic minke whales and fin whales by killing, injuring, taking and interfering with them and the treating and possessing of them and by injuring, interfering with and treating and possessing humpback whales and that, unless restrained, it will continue to kill, injure, take and interfere with them, and treat and possess them”.¹¹

Accordingly the Court issued the following Orders:

“1. The Court declares that the respondent has killed, injured, taken and interfered with Antarctic minke whales (*Balaenoptera bonaerensis*) and fin whales (*Balaenoptera physalus*) and injured, taken and interfered with humpback whales (*Megaptera novaeangliae*) in the Australian Whale Sanctuary in contravention of sections 229,229A, 229B and 229 C of the Environment Protection and Biodiversity Conservation Act 1999 (Cth), (the "Act"), and has treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of sections 229 D and 230 of the Act, without permission or authorisation under sections 231, 232 or 238 of the Act.

2. The Court orders that the respondent be restrained from killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*), fin whale (*Balaenoptera physalus*) or humpback whale (*Megaptera novaeangliae*) in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Australian Whale Sanctuary, unless permitted or authorised under sections 231, 232 or 238 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)”¹²

There was no Order made as to costs in the proceedings.

The Courts decision to issue these Orders was based on the following reasoning:

- The Court documents commencing the proceedings had been validly served on the Respondent in Japan in accordance with the *Federal Court Rules*, and that accordingly the Court could proceed to hear the case notwithstanding the Respondent did not participate in the hearing;

¹⁰ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 33.

¹¹ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 54.

¹² *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 55.

- The *EPBC Act* applies to all persons and all vessels within territorial Australia and the EEZ including persons who are not Australian citizens and vessels that are not registered Australian vessels.¹³
- Australia's claimed EEZ extends to the waters within 200 nautical miles of the Australian Antarctic Territory¹⁴;
- A significant number of whales were taken inside the Australian Whale Sanctuary with Australia's EEZ adjacent to Australia's Antarctic Territory;¹⁵
- The Australian Government has not issued a permit under s238 of the *EPBC Act* authorising the acts of the Japanese whalers;¹⁶
- The crews of the whaling vessels were employees of the Respondent and were acting with the Respondents authority;¹⁷
- Although Australia's claim to sovereignty over the Australian Antarctic Territory is recognised only by four nations (New Zealand, France, Norway and the United Kingdom) and Japan considers these surrounding waters high seas, the sovereign claim by Australia to the Australian Antarctic Territory is not a matter capable of being questioned by the Court.¹⁸ Thus the refusal of Japan to recognise Australia's claim to Antarctica was not a matter for the court to consider. Accordingly the disputed status of Australia's territorial claims was not a ground for invalidity of the *EPBC Act*;¹⁹
- The practical difficulty (if not impossibility) of enforcement and the fact the Orders may not be complied with is not a reason to refuse to grant the Orders sought by the Applicant.²⁰

CONCLUSION:

Although issues of International Law were referred to in the Courts judgment the final decision was made solely on the basis of Australian domestic law. As this decision is only very recent it is not yet clear what the long term implications will be. But certainly this decision represents a controversial new twist to an already very heated dispute between Australia and Japan.

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¹³ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 6.

¹⁴ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 12.

¹⁵ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 39.

¹⁶ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, para 40.

¹⁷ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 42.

¹⁸ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, at para 13.

¹⁹ *Ibid.*

²⁰ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, paras 45-53.